

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1124

Cir. Ct. No. 2012CV3950

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PATRICIA RIPP,

PLAINTIFF-APPELLANT,

V.

**McMILLAN MORTGAGE GROUP, LLC, RENNICK, YOUNG, COHEN &
ASSOC. AND RIGHTWAY SOLUTIONS, INC.,**

DEFENDANTS,

BAC HOME LOAN SERVICING, LP,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Patricia Ripp appeals an order that dismissed five claims Ripp brought against Bank of America, N.A. (BANA) in a multi-party lawsuit arising from the handling of Ripp's application for a loan modification under the federal Home Affordable Modification Program (HAMP). The circuit court ruled that Ripp was barred from proceeding on her claims against BANA in this loan modification action under the compulsory counterclaim rule and principles of claim preclusion because she failed to raise the claims during a prior foreclosure action brought against her by BANA's predecessor in interest.¹ For the reasons discussed below, we conclude that the compulsory counterclaim rule and claim preclusion apply to only one of the five claims at issue. However, we affirm the dismissal on the alternate ground that Ripp's complaint in this action failed to state any claims upon which relief could be granted against BANA, given Ripp's implied concessions on this issue in this appeal.

BACKGROUND

¶2 In 2007, Ripp obtained the mortgage loan at issue in both the prior foreclosure action and this loan modification action. She began having difficulty making payments in 2010, and filed several packets of materials with BANA, seeking to modify the terms of her loan under HAMP. In September 2010, while Ripp's loan modification efforts were still ongoing, BANA filed the foreclosure action against her. Ripp contacted a BANA representative who advised her that

¹ BANA asserted in the trial court that it became the successor in interest to the mortgage loan through a merger with BAC Home Loan Servicing that occurred on July 1, 2011. BAC, in turn, claimed to have obtained its interest from the original lender, Countrywide Home Loans. Because neither party disputes those assertions on this appeal and both briefs treat BANA as the real party in interest, we will follow the parties' lead and refer to all of BANA's predecessors-in-interest collectively as BANA.

the foreclosure action would not interfere with or affect the loan modification process. Ripp asserts that, based upon that representation and subsequent reassurances from BANA that her loan application was moving forward, she did not file an answer to the foreclosure action. In the absence of an answer, judgment of foreclosure was issued against Ripp on April 18, 2011, triggering a six-month redemption period.

¶3 A BANA underwriter informed Ripp on August 23, 2011, that her loan qualified for modification. The underwriter told Ripp that a BANA negotiator would be contacting her within fifteen days to discuss the modification, but no one from BANA ever contacted her and she was not offered a loan modification. She subsequently learned that the delay may have been due to confusion over who was the proper holder of the loan note.

¶4 On or about September 14, 2011, about five months into her redemption period, Ripp filed a motion for relief from the foreclosure judgment, alleging that she had been induced not to respond in the foreclosure action by BANA's misrepresentations that it was the proper entity from which to seek modification, that a loan modification process was underway, and that the process would be completed prior to completion of the foreclosure proceedings. The circuit court denied Ripp's motion for relief from the foreclosure judgment on October 6, 2011. Ripp did not appeal that decision.

¶5 On October 2, 2012, Ripp filed the present action against BANA, the mortgage broker, and two companies to whom Ripp had paid money to assist her in obtaining a loan modification. Ripp subsequently amended her complaint to raise the following five claims against BANA: (1) negligence in granting the mortgage loan, servicing it, and reviewing offers to modify it; (2) violation of WIS.

STAT. § 224.77 (2011-12)²—which sets forth prohibited practices for mortgage bankers—by issuing Ripp a loan that she did not have a reasonable likelihood of repaying; (3) breach of an implied good faith clause in the mortgage contract by offering a loan modification and not following through on it; (4) violation of WIS. STAT. § 100.18—which prohibits fraudulent marketing representations to the public in order to sell goods or services—by telling Ripp that the foreclosure proceedings would not jeopardize a loan modification, that the loan modification process was underway, and that she had qualified for a loan modification; and (5) intentional misrepresentation based upon the same statements. The circuit court dismissed all five of Ripp’s claims against BANA on alternate grounds: that they were procedurally barred by the compulsory counterclaim rule and principles of claim preclusion, and that they failed to state legal theories upon which relief could be granted. Ripp appeals.

STANDARD OF REVIEW

¶6 The application of claim preclusion and the compulsory counterclaim rule to a particular set of facts presents a question of law that we review de novo. *Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738.

¶7 We also independently consider whether the facts alleged in a complaint are sufficient to state a claim upon which relief could be granted. *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶10, 343 Wis. 2d 83, 816 N.W.2d 878.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

Compulsory Counterclaim Rule

¶8 The common law compulsory counterclaim rule bars a subsequent action by a party who was a defendant in a prior suit—notwithstanding the general permissive counterclaim statute, WIS. STAT. § 802.07(1)—when all of the elements of claim preclusion are present and “a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action.” *Menard*, 282 Wis. 2d 582, ¶¶27-28. The elements of claim preclusion are: “(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.” *Id.*, ¶26.

¶9 We address the third element of claim preclusion first because foreclosure actions are atypical in that they involve two, separately appealable decisions: a judgment of foreclosure that determines the parties’ legal rights with respect to a mortgage note and the underlying property; and a subsequent confirmation order determining whether the proper procedures were followed at the sheriff’s sale. *See Shuput v. Lauer*, 109 Wis. 2d 164, 171-72, 325 N.W.2d 321 (1982). Although a foreclosure judgment is considered final for purposes of appeal, certain subsequent events may affect it—and the circuit court maintains continuing jurisdiction over the action—until the confirmation order has been entered. For instance, under WIS. STAT. § 846.13, a mortgagor may discharge a foreclosure judgment and redeem the foreclosed property by paying the amount of the judgment at any time prior to the sale of the property. Although the parties have not clearly explained the mechanics of the HAMP process in their briefs, we

infer from submissions in both this court and the circuit court that a loan modification under HAMP could similarly act to redeem the foreclosed property and preclude a sheriff's sale.

¶10 Here, BANA identifies the foreclosure judgment as the prior determination that provides preclusive effect for Ripp's loan modification suit. However, Ripp points out that many of the events giving rise to her claims in the loan modification suit did not occur until *after* the judgment of foreclosure had already been entered in the foreclosure action. BANA counters that this court has previously applied the compulsory counterclaim rule and principles of claim preclusion to bar claims relating to an attempted loan modification that occurred during a foreclosure proceeding. See *Moser v. Anchor Bank FSB*, No. 2012AP2700, unpublished slip op. (WI App June 20, 2013).

¶11 While we agree that *Moser* can properly be cited for its persuasive value, BANA misinterprets the ruling of that case. In *Moser*, we reasoned that a home owner who had been a party in a prior foreclosure action could have brought a counterclaim raising loan modification issues after the entry of the judgment of foreclosure but prior to the entry of a confirmation order, because it appeared that a successful claim at that stage could still have prevented the sheriff's sale. Thus, we held that *the confirmation order* that had been entered in the prior action acted to bar a subsequent action raising loan modification issues. Here, the parties inform us (and docket entries confirm) that there has not yet been a confirmation order issued in the foreclosure action against Ripp, due to bankruptcy proceedings. Therefore, the time identified in *Moser* for a mortgagor in Ripp's position to bring a counterclaim has not yet run, and there is not yet in place a final order with preclusive effect regarding any claims that matured after the issuance of the judgment of foreclosure.

¶12 We agree with BANA, however, regarding one of Ripp's claims. Ripp's claim that BANA violated WIS. STAT. § 224.77 by issuing Ripp a loan that she did not have a reasonable likelihood of repaying relates to the origination of the loan and was fully matured by the time BANA filed the foreclosure action. Therefore, that claim could and should have been raised in a counterclaim, and is barred by entry of the judgment of foreclosure.

Sufficiency of the Complaint

¶13 As an alternate basis for its dismissal order, the circuit court also determined that Ripp had failed to state claims upon which relief could be granted against BANA. Specifically, with respect to the four remaining claims, the circuit court ruled that the tort-based negligence and intentional misrepresentation claims both failed due to the economic loss doctrine; the breach of contract/good faith claim failed because it was premised upon BANA's alleged failure to properly handle Ripp's HAMP application, and there is no private cause of action for HAMP violations; and the claim for deceptive trade practices under WIS. STAT. § 100.18 failed because Ripp was not a member of the general public, but rather someone in a contractual relationship with BANA. BANA discusses each of these propositions in its response, along with additional arguments as to why no relief could be granted on any of Ripp's remaining claims.

¶14 Ripp, however, has not responded to any of the circuit court conclusions or BANA's arguments regarding the sufficiency of the complaint to state claims upon which relief could be granted. Instead, she rests on the assertion that it was error for the court to address her claims on their merits after determining that they were procedurally barred.

¶15 While we agree that a circuit court could not properly *grant* relief upon procedurally barred claims, it does not follow that a court is prohibited from discussing alternate grounds that would support its decision to dismiss such claims. In any event, it is well established that a respondent may raise any argument that supports the circuit court ruling—even on a theory or reasoning not presented below—and that this court can affirm on any grounds that support the result reached by the circuit court. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. Therefore, the sufficiency of the allegations in the complaint are properly before us on this appeal. Because Ripp has failed to respond to BANA’s contention that her complaint failed to state any claim upon which relief could be granted, we deem that contention to have been conceded without independently discussing its merits. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Accordingly, we conclude that the dismissal of all five of Ripp’s claims against BANA was proper.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

